

19. (Amended) A method of thickening a composition comprising biliquid foam dispersed in a salt-containing aqueous phase having a pH of less than [about] 7 comprising gelling the aqueous phase with a polymeric sulfonic acid.

REJECTION OF CLAIMS 1-21 UNDER 35 U.S.C. §103

The Office Action rejected claims 1-21 as being unpatentable over Wheeler (WO 97/32559) (“Wheeler”) in view of the Clariant product (“Clariant”). Specifically, the Office Action states:

The amended claim recites a pH of less than about 7 and this pH is less than 7; also, Wheeler teaches pH of 6.5 in example 3 and this pH is less than 7. Wheeler teaches Carbomer as a gellant but the secondary reference, Clariant product brochure, teaches polymeric sulfonic acid as gelling agent for systems such as the one disclosed by Wheeler and one gelling agent can be substituted for another and expect the gelling of the aqueous solution to take place. The declaration is not commensurate with the scope of the claims. Since the secondary reference teaches polymeric acid as a gellant, and since one gellant can be substituted for another, prediction or lack of prediction of the superiority of the polymeric sulfonic acid over the carbomer would not distinguish over the composition formed by substituting polymer sulfonic acid for carbomer since the same effect is obtained.

Office Action, pp. 2-3

In response, Applicants again submit that the Examiner has failed to present a *prima facie* case of obviousness because all of the elements of the claims are not found either alone or in combination in the prior art cited.

The Applicants’ invention teaches a cosmetic or pharmaceutical composition comprising an oil-containing biliquid foam dispersed in a salt-containing aqueous phase, in which the aqueous phase, having a pH of less than 7, comprising a polymeric sulfonic

acid gellant. The claims have been amended to clarify the confusion of the acidic nature of the composition, by deleting the term “about.” As a review, the present invention is partially predicated on the fact that an acidic solution is necessary to allow the use of electrolytic acidic actives therein. A biliquid foam, as is described in the Applicants’ specification, in Wheeler’s specification, and as is well known in the art, is advantageous because it permits the incorporation of a relatively large quantity of oil and oil soluble actives into an aqueous phase with the use of a very small amount of surfactant. Also well known in the art is the fact that surfactants are used in large quantities in compositions to provide stability.

Turning to Wheeler, as is recognized by the Examiner, no teaching or suggestion exists therein for use of a polymeric sulfonic acid gellant. The Examiner states that the polymeric sulfonic acid gellant disclosed in Clariant can be readily substituted into the composition of Wheeler, arguing that “one gelling agent can be substituted for another and expect the gelling of the aqueous solution to take place.” See Office Action, p. 3. Moreover, the Examiner claims that a composition having a pH less than about 7 includes a pH of 7, which is taught in Wheeler. First, Applicants request entry of the amendment of the claims to delete the term “about” in order to avoid further confusion on the acidity of the composition claimed. Moreover, the Applicants submit that the Examiner still continues to ignore the ample evidence submitted by Applicant that there is no suggestion in either reference to substitute a polymeric sulfonic acid as a gellant for the carbomer in example 3 of Wheeler or several of the other gelling agents recited in Wheeler (Matathia and Harrison Declarations). In essence, both Declarations unequivocally demonstrate that the polymeric sulfonic acid gellants are unexpectedly superior in comparison to

carbomers or several of the other gelling agents recited in Wheeler. Therefore, the Examiner's repeated assertions that any gellant may be substituted for the gellants in Wheeler are completely unsupported in light of the evidence submitted by Applicants as to the unexpected superiority of the Applicants' claimed polymeric sulfonic acid gellants in gelling a biliqid foam-containing aqueous dispersion to form a low pH (less than 7) stable product.

Furthermore, Wheeler does not even suggest a stable biliqid foam composition with a low pH, as is asserted by the Examiner. Although Wheeler proposes a biliqid foam composition in example 3, the extremely large amount of surfactants (>50%) present in that composition takes the composition outside the definition of a biliqid foam as is known in the art (low levels of surfactant) and as is taught in the present invention (less than about 1% surfactant). Moreover, as is discussed hereinabove, it is well known in the art that excess surfactants are used for the purpose of providing stability in cosmetic compositions. It is therefore clear that in example 3 of Wheeler, without the excess of surfactants, a stable biliqid foam with a pH of 6.5 would not have been possible. This is further supported by the evidence submitted in the Harrison Declaration, which the Examiner has continually ignored. Specifically, the test results showed that a composition as is taught in Wheeler with a pH of 5.5 (pH below 7, as is required by the present claims), exhibited syneresis and was therefore unstable (Declaration, pp. 2-3). Therefore, Wheeler does not teach a stable biliqid foam composition with a pH of less than 7, and therefore would not lead a person of ordinary skill in the art to find a means of providing a stable biliqid foam dispersed in an aqueous phase having a pH less than 7 without the benefit of Applicant's own disclosure.

Moreover, Examiner's argument that Applicants do not exclude the presence of surfactants in the claims is irrelevant since the Applicants are not trying to claim a difference in the two compositions based on the amount of surfactant used or that the polymeric sulfonic acid would not gel the composition claimed in Wheeler. Instead, the Applicants argue that without the benefit of Applicants' disclosure, and therefore hindsight reconstruction, a person skilled in the art would not be motivated to substitute the gellants in Wheeler with the polymeric sulfonic acid gellant in Clariant since the polymeric sulfonic acid gellant is unexpectedly superior to other gellants suggested in Wheeler. It is well established law that evidence of unexpected results is evidence of nonobviousness in order to rebut an obviousness rejection. See e.g., *In re Soni*, 54 F.3d 746, 34 USPQ2d 1684 (Fed. Cir. 1995) ([W]hen an applicant demonstrates substantially improved results, as Soni did here, and states that the results were unexpected, this should suffice to establish unexpected results in the absence of evidence to the contrary).

In conclusion, Wheeler does not teach or suggest the use of a polymeric sulfonic acid gellant, nor a stable biliquid foam dispersed in an aqueous phase having a pH of less than 7 and Clariant does not supply this deficiency. Therefore, it would not be obvious to make the substitution of the a polymeric sulfonic acid gellant in Wheeler's composition when such a gellant is not even suggested in the lists of gellants provided in Wheeler and since such a gellant creates an unexpectedly superior product, thereby rendering the gellant as a nonobvious substitution.

The Applicants therefore respectfully request that the Examiner withdraw the rejections and pass the amended claims to issuance.